THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
2013-002319

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative of the Estate of Marion M. Kay, ... Appellant/Cross-Respondent

v.

Martha Brown and Mary Moses,. . . . . Respondents/Cross-Appellants

PETITION FOR REHEARING OF RESPONDENTS/APPELLANTS

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A BRIEF SUMMARY OF THE RELEVANT FACTS

The Personal Representative in this case had secretly given himself 18.3% of the Estate ($ 93,775) as his fee prior to the probate hearing on his accounting and then had sought an additional $ 13,447.05, which would have brought his fee up to 21% of the Estate. The total he sought in commissions, fees for his firm and expenses for an uncomplicated estate was $ 157,179 or 31% of the Estate, not counting his attorney fees and costs. He "had no method or formula for determining the amount for the four draws he gave himself other than by pulling figures out of the air." and he "failed to provide a legitimate basis for his fees." As a result of the efforts of Respondents/Appellants' counsel, his fee was cut by $ 42,475 to 10% of the Estate. This money is to be returned to the Estate for the benefit of all the heirs.

The Court has conceded the benefit to all the heirs, but it has reversed the two judges below who awarded Respondents/Appellants' counsel an attorney fee because the interests of some of the heirs were said to be adverse to those of Respondents/Appellants, and there was supposedly no express or implied contract of employment between their counsel and the other beneficiaries.

Though this is an action for an accounting, the Court found that the case was at Law and not in Equity and applied the legal standard of review.

Though the probate judge, the circuit court and this Court found that the Personal Representative's litigation (and therefore his appeal to reverse the denial of the relief he sought) was for his own personal benefit, this Court denied relief to Respondents/ Appellants for their attorney fees and costs in fighting the PR's attempts to get nearly $ 56,000 more from the Estate for himself plus costs and attorney fees through this appeal by finding that the arguments for that were abandoned. This Court also upheld the PR's fee of 10% of the Estate.

ARGUMENT

It is the position of Respondents/Appellants that the Court misapprehended or overlooked the following points which warrant rehearing:

I. The Court erred in concluding that the heirs other than Respondents/Appellants had interests materially adverse to them.

In order to understand what adverse interest means, it is useful to consult the relevant precedent. The case of Bedford v. Citizens & S. Nat. Bank of SC, 203 S.C. 507, 28 S.E.2d 405 (1943), cited by this Court, is instructive. The Court there stated the facts to be as follows:

> A successfully sued B for recovery of the fund; C then sued A for recovery of the same fund and also succeeded; A's attorneys, successful in their original suit but failing in their efforts to retain the fund for their clients against C's claim (the latter represented by other attorneys), now seek to collect a fee from the fund over the opposition of C, who has his own attorneys to pay. 28 S.E.2d at 406.

It will readily be seen that in that case the other parties derived no benefit from the efforts of A's attorneys and had no reason to compensate them. That is not the case here where counsel's efforts resulted in an increase in the Estate of $ 42,275, in which all the heirs will share, and in the defeat of the PR's demand for an additional $ 13,447.05, a total benefit of almost $ 56,000. As the Court said in Johnson v. Williams (also cited by this Court), 196 S.C. 528, 14 S.E.2d 21, 23 (1941), "It is... essential that the services prove fruitful to the general class. In other words, if no actual benefit accrues from the services rendered there can be no allowance of fees from the common fund."

This is because "the common fund doctrine is based on the equitable allocation of attorneys' fees among a benefitted group...." Layman v. State, 376 S.C. 434, 658 S.E.2d 320, 330 (2008). The focus is thus on actual benefit to the heirs, not the existence of random squabbles. There can be no doubt that all the heirs here benefitted from the services of Respondents/Appellants' attorney.

The heirs in question in the Johnson case were, like the heirs here, unrepresented by counsel at the accounting hearing and did not argue their own interests. The Court observed, "It is true that in the contest by [Attorney] he acted primarily in the interest of [his clients] and did not profess to act on the theory of representation in behalf of [the other heirs], but they are all members of the same class." 14 S.E. at 23.

In granting the attorney there a fee the Court found, "The successful termination of that case, due solely to the efforts of [Attorney], resulted in the establishment of their rights to share in the fund. ... It is repugnant to fundamental principles of equity... that

they should reap where they have not sown, free from any legal duty to compensate those who made the reaping possible." 14 S.E. at 24.

In its opinion this Court found an adversarial relationship, not because of the aim of Respondents/Appellants to increase the value of the estate by having the Personal Representative disgorge unearned commissions, but because two of the seven heirs wanted their money sooner rather than later. That is not a sufficiently substantive disagreement on which to found an adversarial relationship.

This is shown by Peppertree Resorts v. Cabana Limited Partnership, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993). There "although the relationship of Cabana and the respondents has been strictly adversarial since the appointment of the receiver, both prior to and subsequent to appointment of the receiver, the respondents... and Cabana had a mutual interest in the success of Cabana's attorneys." 315 S.C. at 41. The central question was thus whether there was a unity of interest in the ultimate aim of the attorney's work, increasing the value of the Estate for the benefit of all the heirs, not whether any disagreements existed. The Court there went on to hold that Equity required that Cabana's attorneys be paid from the common fund.

Here, two of the heirs may have been impatient to get their money, but beyond doubt all the heirs wanted as much money as they could get, and Respondents/Appellants assisted them in that. Though Appellant/Respondent professes tender concern for their wishes, it is his refusal to make a refund to the Estate or even to deposit his excess fee with the Clerk and his appeal which have delayed distribution for years. (But for his appeal, Respondents/Appellants would have waived their right to appeal.)

The Court erred factually in stating that heirs having 70% of the Estate wanted an immediate sale of the property. As far as Lisbon Presbyterian Church and the Lisbon Cemetery Fund were concerned, that decision could only have been made by a congregational vote (See Exhibit C-9, R. p. 630 and R. p. 471, ll. 17-19; R p. 198, ll. 15-18 and R. p. 472, ll.1-5.) Such a vote was not held until this case was well under way and after Respondents produced a buyer for the property (R. p. 133, ll. 16-21), because the Appellant PR refused to provide the information requested by the Lisbon Church Session, including information about what he had paid himself (See R. pp. 633, 833, 865-71, 873.)

The alleged personal preference of Lisbon's pastor, who did not testify, is irrelevant; and his opinion of what the congregation supposedly would have voted for is speculative. This means that only heirs with a 20% interest (See R. pp. 24-25.) can be said to have supported an immediate distribution. It should also be noted that Respondents owned 60% of the farm (their half interest plus what the Will gave them) while the two impatient heirs owned a total of 8% of the farm.

This Court was further in error in stating that Respondents opposed the sale of the farm property (R. pp. 311, l. 5- 313, l. 22) . While they did oppose the sale of a mere portion of the property to Mr. Copeland contrary to the Will and the PR's defective and unequal partition of the farm (R. pp. 311, ll. 5-7; 312, l.24- 314, l. 2), they did not oppose the sale of the farm to Roland Milam because that was reasonable for all the heirs. (See R. pp. 283, ll. 9-18 and 311, ll. 5-7, 9-18.) Partition alone would not have produced a buyer to purchase the farm, and a partial sale would not have accomplished the goal of Presbyterian Home. Even Appellant's counsel said he would not characterize Respondents' opposition to partition as wrongful or unreasonable (R. p. 493, ll. 18-22).

This Court has read the no adverse interest requirement (which was never argued by Appellant) too broadly. It does not require that all parties be in total lockstep; it merely requires that the parties from whom fee contribution is sought have received a material benefit from the labors of the attorney seeking the fee and that the unrepresented parties do not unjustly reap where they have not sown.

II. The Court erred in finding that there was no implied contract between counsel for Respondents/Appellants and the other heirs.

"The [common fund] rule is founded upon the just principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefitted should bear their just share of the expenses, including a reasonable attorney's fee...." Johnson v. Williams, 196 S.C. 528, 14 S.E.2d 21, 23 (1941). This is the basis for the implied contract.

Appellant/Respondent has not appealed the findings of the probate judge that the work of Respondents/Appellants' counsel was necessary and related to the merits of the matter and that he preserved and protected a common fund (R. p. 12, No. 4). These

findings are therefore the law of the case.

This Court had no trouble in finding that Respondents/Appellants' counsel had caused to be created and preserved a common fund of the $ 42,275 (and prevented an additional payment of $ 13,447.05 to the PR plus payment of his costs and attorney fees) which the Personal Representative was ordered to return to the Estate and which all the heirs were entitled to share. However, this Court determined that there was no implied contract between the attorney and the other heirs and denied a fee on that basis, even though Appellants never argued this.

It is instructive to consult the Peppertree Resorts case cited by the Court to understand what is required for an implied contract to exist. The Court there elucidated, "[W]hen a party who is unrepresented by counsel will benefit from a common fund and has acquiesced in the actions of another party's attorney in creating this fund, the law will impose a contract on the former to pay for the services rendered." 315 S.C. at 41. The other parties here did not file any objection with the Probate Court or hire counsel to oppose what Respondents/Appellants wanted to and did accomplish. After the order of the Probate Court, they made no effort to disclaim any interest in the common fund. All that two of them (not the Lisbon Church and the Lisbon Cemetery Fund, which together had a 50% interest) did was to complain that they were not getting their money fast enough. This is an insufficient basis for them to avoid paying for the legal services which have enriched them. As the Johnson case shows, the focus is on the benefit received by the heirs and how this affects the equities of the situation, not how close their relationship was with the counsel who benefitted them: "It is... essential that the services prove fruitful to the general class." Johnson v. Williams, 14 S.E.2d at 23.

By not actively opposing Ms. Brown and Ms. Moses (beyond two heirs stating their preference for when they would get paid) and by being willing to accept the benefits resulting from Ms. Brown's and Ms. Moses's litigation, the heirs have acquiesced in the actions of the attorney that benefitted them. By law this is a sufficient foundation for an implied contract, and Equity requires this Court to impose an implied contract to avoid unjust enrichment. (See R. p. 12, No. 4.)

If this Court changes its mind concerning Respondents/Appellants' entitlement to attorney fees for the Probate Court work, it should also reconsider its denial of attorney

fees and costs for this appeal, which was to preserve the common fund from Appellant's attack, inasmuch as its denial of relief for appellate expenses was partially based upon its previous denial of relief under the common fund doctrine for the Probate Court work.

III. The Court erred in finding that Respondents/Appellants' arguments in favor of being paid their costs and attorney fees for this appeal can be ignored as abandoned.

The undersigned is particularly aggrieved by a finding that the issue of Respondents/Appellants' costs and attorney fees for the appeal was abandoned. Page 7 of Respondents' Brief of Respondents/Appellants sets out the central arguments for requiring the PR to pay the costs associated with an appeal which was primarily for his personal benefit and not for the Estate. The arguments advanced are succinct but not mere conclusions, and they are supported by four case citations and three citations to the record plus arguments at pp. 6-7 of the Reply Brief of Respondents/Appellants and pp. 11-12 of the Brief of Appellants/Respondents.

The foundation of the exception was the finding of the Probate Court and the circuit court that the PR's litigation was for his personal benefit and not for the benefit of the Estate. (See R. p. 11, No. 19 and p. 12, No. 5.) As this Court found, "We concur with the probate court's finding that Appellant's counsel fees primarily stemmed from the contest between Appellant and Respondents over the amount of his compensation and, thus, were properly assessed against Appellant in his individual capacity." Shearouse Advance Sheet No. 24, filed June 15, 2016, p. 37 at p. 48, paragraph 3. It must therefore follow that the PR's appeal to overturn the denial of the benefits he sought for himself is for his own benefit and not for the Estate. This is not a mere unmoored conclusion of counsel; it is a finding of two judges upheld on appeal by this Court. To require the Respondents to pay all the fees and costs associated with blocking the PR from taking more of the Estate from the heirs for himself in this appeal is extraordinarily unfair.

It is inconsistent that this Court considered the merits of Appellant's exception to the award of an attorney fee to Respondents' counsel. His argument for that was barely longer than what this Court found to be abandonment on Respondents' part, and it had only one case citation. The Court accepted none of his arguments yet ruled in his favor.

The Court's citation of Bennet v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) for what constitutes abandonment does not support its conclusion; because that case correctly notes the requirement that abandonment of an issue requires **both** a conclusory argument **and** a lack of supporting citations. The undersigned's arguments, which were not mere conclusions, were amply supported by citations. The arguments were thus not abandoned as a matter of law.

Even assuming that this Court disagrees with Shakespeare that "Brevity is the soul of wit." and is not burdened by the verbosity of the Bar, until the Court's rules inform the Bar of some sort of minimum word requirement for arguments, it violates the Respondents/Appellants' right to due process for this Court to rest the disposition of an issue on a cursory review based on the length of an argument rather than its content.

IV. The Court erred in applying an improper standard of review.

The purpose of the probate hearing which began this case was for the Personal Representative to give an accounting of his handling of Estate assets and his charges to the Estate in accordance with S.C. Code Section 62-3-1001(a)(3). See R. p. 122, ll. 23-24; p. 851 and p. 854(5)(A). This appeal has continued to examine that accounting. As Appellant-Respondent's counsel correctly noted in his Respondent's Brief of Appellant-Respondent (p. 8), "An action in accounting sounds in equity. Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 696 S.E.2d 599 (Ct. App. 2010)." This Court's characterization of the case as one at law involving claims for money due is in error and not supported by the record.

Because this is fundamentally an equitable action and the findings of the probate judge were concurred in by the circuit court judge, those findings are not to be disturbed on appeal unless it is shown that they are without evidence to support them or against the clear preponderance of the evidence. Crown Central Corp. v. Elmwood Prop., 244 S.C. 588, 138 S.E.2d 38 (1964). There is abundant supporting evidence for their rulings in favor of Respondents, and the findings of the learned judges below are not contrary to the clear preponderance of the evidence. See R p. 5(21), p. 6(4) and p. 7(e).

"[A]n action at equity first tried by [the probate court] subsequently affirmed or concurred in by the circuit court will not be disturbed on appeal unless found to be

without evidentiary support." Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154 (1993). See also Matter of Will of Hall, 318 S.C. 188, 456 S.E.2d 439, 441 (Ct. App. 1995). There is strong evidentiary support for the holding that Respondents/Appellants' counsel is entitled to a fee based upon his role in creating and preserving a common fund benefitting all the heirs.

Application of the proper standard of review mandates that this Court uphold the findings of the courts below and therefore uphold the granting of an attorney fee to Respondents/Appellants' counsel for his role in creating and preserving a common fund benefitting all the heirs.

V. The Court erred in finding that the Personal Representative was entitled to a fee equal to 10% of the Estate.

While this Court found that the actions of the Personal Representative in bringing the Estate to a conclusion were not in bad faith, the inquiry cannot end there. The payment to which he was entitled was also at issue. This Court stated that the 10% awarded the PR was reasonable- although the statutorily required finding of extraordinary services was not made by the probate judge- but that overlooks the fact that the PR was attempting to pay himself 21% of the Estate and to charge a total of 31% of the Estate for himself and his law firm (R.p.10, No. 12)- including over $ 18,000 in needless paralegal expenses (204.6 hours x $90/hr.) for the purpose of valuing the personal property in the Estate to boost the PR's commissions- plus his personal attorney fees and costs for what should have been an uncomplicated estate, much more than three courts have found to be supported by the evidence. The courts below rejected the PR's claims concerning the hours he worked (R. p. 9, No. 8) and found his commissions to be "clearly excessive" (R. p. 10, No. 13) and without a legitimate basis (R. p. 9, No. 8). This means that the judge who heard the PR's testimony found him not to be credible, which was amply supported by the record. None of this supports a finding that a 10% fee for the PR was reasonable under the statute or under the Will, and that finding is against the clear preponderance of the evidence. See R. pp. 1414-1429 where the PR's pattern of conduct detrimental to the Estate is set out. The Testatrix's intent was to benefit her heirs, not to sue them and to enrich the PR at their expense.

As this Court stated in its opinion, he "had no method or formula for determining the amount of the four draws he gave himself other than by pulling figures out of the air.", and he "failed to provide a legitimate basis for his fees." In essence this Court is now saying that the litigation the PR caused by the extra $ 42,475 he wrongfully paid himself in commissions (and hid from the heirs) plus the additional $ 13,447.05 he demanded (a total of almost $56,000) is just a minor inadvertence of no significance.

The PR knew that the way to determine a fee if there was any doubt was to apply to the Probate Court to approve one (R. p. 204, ll. 16-18), but he chose instead to pay himself in secret what he alone decided he was worth. He then asked the heirs to approve those fees without informing them of their amount until Ms. Brown and Ms. Moses forced him to do so. If a trustee had paid himself an extra $ 56,000 without telling the beneficiary, surely this Court would not have said that that was of no importance because he claimed he deserved it. The facts found do not support the conclusion stated.

Although the Court noted that the PR consulted with legal counsel (who did not testify and whose affidavit was not accepted into evidence), it fails to note that this was after he had paid himself what the two judges below later found to be "clearly excessive" commissions without any legitimate basis and that the consultation was to support his inflated past and contemplated future payments to himself. The expert made no independent investigation and did not even see the PR's time sheets (R. p. 166, ll. 1-3). He based his opinion solely on what Appellant/Respondent told him. This cannot be considered an independent and valid expert opinion.

It is inconsistent that this Court has found that there was no necessity for the Respondents to have filed a petition in the probate court but at the same time to find that Clean Hands was not an issue because it was not pled. This is an issue which permeates the record and was argued by consent. (See for example R. pp. 1414- 1429 and especially 1426(k).) Three courts' factual findings mandate a finding of unclean hands. There was no need to plead it, and it should at least be treated in the same manner as the unpled unjust enrichment argument made by Appellant, which was considered on the merits by this Court.

It is this Court's duty to decide not merely what a personal representative can get away with but what is right conduct for a fiduciary. Here, the clear preponderance of the

evidence shows that the PR consistently put his own interests ahead of those of the Estate, and Justice requires that he not be rewarded for that.

CONCLUSION

The Court has overlooked or misinterpreted important factual, equitable and legal elements of this case. As a result, Respondents/Appellants are entitled to the granting of their Petition for Rehearing and to the relief they have sought in their appeal. In being as succinct as possible in deference to the Court, the undersigned has not abandoned any of the issues raised here.

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July 28, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
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In the Matter of the Estate of Marion M. Kay

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v.

Martha Brown and Mary Moses, ...Respondent/ Appellant

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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox Ferguson & Wham, LLC and that on the 28 day of July, 2016 she served the Petition for Rehearing of Respondents/Appellants herein by depositing two copies of it in the United States Mail, postage prepaid and addressed to:

Daryl G. Hawkins, Esq.
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Deborah S Ball

July 28, 2016

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July 28, 2016

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S.C. Court of Appeals
1015 Sumter St.
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Re: Sullivan v. Moses et al., 2013-002319

Dear Ladies:

With this letter I am enclosing an original and nine copies of the Petition for Rehearing of Respondents/Appellants in the above-referenced action. Please file the original and distribute the copies to the panel. I am also enclosing an original and a copy of a Certificate of Service on opposing counsel. Please file the original and return to me a clocked copy in the enclosed envelope. Thank you for your help.

Sincerely,

John R. Ferguson

JRF/wp
Encl.